Nos. 09-1454, 09-1478

IN THE

Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,
Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE LEGAL AID SOCIETY, JUVENILE RIGHTS PRACTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The Legal Aid Society is the nation's oldest and largest provider of legal services to low income families and individuals, providing legal representation in more than 300,000 legal matters for clients each year. The Legal Aid Society's Juvenile Rights Practice provides comprehensive legal representation to children who appear before the New York City Family Courts in all five boroughs, in abuse, neglect, juvenile delinquency, and other proceedings affecting children's rights and welfare. Last year, our Juvenile Rights staff represented some 30,000 children. Our perspective comes from our daily contacts with children and their families, and also from our frequent interactions with the courts, social service providers, and State and City agencies. In addition to representing many thousands of children each year in trial and appellate courts, Legal Aid also pursues law reform litigation and initiatives on behalf of our clients.

We are deeply devoted to furthering the interests of children. Our experience teaches us that those interests are best served when the law attempts to strike a fair balance between the parents' right to raise their children as they see fit, the family's right to be together, the children's own Fourth Amendment right to be free from unreasonable searches and seizures, the State's interest in protecting children from harm at the hands

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1. Pursuant to Sup. Ct. R. 37.6, *Amicus Curiae* certify that no counsel for a party to this action authored any part of this brief, nor did any party or counsel for a party, or any other person or entity, make a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this brief.

of their caretakers, and the children's own interest in being protected. We want child protective authorities to be able to function effectively in their investigations. We are troubled when we learn of child abuse that might have been prevented by faster and more effective intervention by a child protective agency. But we also know that child protective agencies sometimes overreact to sensational publicity regarding child abuse that occurred on their watch by sending overt or subtle signals to employees that they should "remove the children first and ask questions later" whenever there is a hint of danger however remote.

So we are fearful at both extremes: we fear too little agency action, and too much. Yet, while there is precious little the courts can do about a child protective agency's undue reluctance to seize children, there is much the courts can do about an agency's abuse of its authority to seize children without first seeking a court order. For that reason, we believe that there should be advance judicial review of any agency action that implicates Fourth Amendment rights, unless such review is impracticable or would unduly constrain the agency in its efforts to protect children from serious harm. We hope this Court will arrive at a decision in this case that will advance that goal.

SUMMARY OF ARGUMENT[2]

Investigations conducted by child protective authorities involve a broad range of activities, some of which do not implicate the liberty and privacy interests protected by the Fourth Amendment at all, some of which go just over the line, and some of which are highly intrusive and clearly threaten not only compelling liberty and privacy interests, but also children's physical and emotional well-being.

Child protective authorities, sometimes accompanied by law enforcement officers, enter homes without a court order or the occupants' consent to conduct investigative interviews regarding allegations of abuse or neglect, to conduct an intrusive physical examination of the children, and/or to remove children who, the agency already believes, require immediate protection. Like a warrantless entry by law enforcement officers who are investigating criminal activity, an intrusion into the sanctity of the home by child protective authorities implicates fundamental privacy interests protected by the Fourth Amendment.

When a child protective worker takes physical control of a child outside the home and places the child in foster care, the restraint on the child's liberty is, at the very least, the functional equivalent of an arrest. Some types of

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2. Since the facts of this case already have been set forth by the parties and other *amici*, we have chosen not to offer the Court yet one more version. Relevant facts have been integrated as necessary into our brief. We have also chosen not to address the question of the reviewability of the Ninth Circuit's Fourth Amendment ruling. But while our brief is designed to assist the Court should it reach the Fourth Amendment issues, we agree with respondents that the Ninth Circuit's ruling is not reviewable.

physical interference with the child's freedom of movement - for instance, when a child protective caseworker compels the child to travel from one location to another - involve restraints that fall short of a seizure for placement in foster care, but still go well beyond what is typical in the context of a police officer's *Terry* stop.[3] Other types of physical interference resemble a *Terry* stop, while other activities - for instance, investigative questioning that involves little or no significant restraint on the child's freedom of movement - will not even activate Fourth Amendment protections. Needless to say, there can be no "one-size-fits-all" application of the Fourth Amendment in the child protective context. Different standards should govern different activities. In this case, there was, in fact, a seizure of S.G. at the school, and advance judicial authorization should have been sought beforehand. But, however the Court rules, what we want most of all is for the Court to ensure that any Fourth Amendment standards it announces while resolving the dispute in this one case make sense when the entire continuum of child protective interventions is contemplated.

It is equally important that the Court not fall prey to alarmist rhetoric proffered by petitioners and their *amici* supporters. We acknowledge the State's compelling interest in protecting children from abuse and neglect, and the children's interest in being protected, but "state officials cause real harm in their quest to protect children, including fear, humiliation, shame, and emotional devastation, not to mention the loss of the children's and sometimes also their families' Fourth Amendment rights and the fundamental interests these implicate." Coleman, *Storming the Castle to Save the Children: The Ironic Costs*

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3. *Terry v. Ohio*, 392 U.S. 1 (1968).

of a Child Welfare Exception to the Fourth Amendment, 47 WM. & MARY L. REV. at 527.

Moreover, child protective workers and law enforcement officers sometimes exercise very poor judgment, whether because of an excess of zeal or because of incompetence. *See* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 525 (November, 2005) ("Too many officials on the ground are undertrained in relevant respects. Moreover, experience shows that children and families cannot count on officials to exercise their discretion in objectively reasonable ways. In particular, [Child Protective Services] and the police often assume guilt at the outset, and thus approach the evidence gathering process with an eye toward proving that assumption").

Thus, whatever the truth may be with respect to reports of abuse or neglect that are based on false information,[4] the importance of judicial oversight, in those circumstances in which it is practicable, cannot be gainsaid.

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4. In the *Brief of the States of Arizona, et al. as Amicus Curiae in Support of Petitioners*, it is suggested that the reported 61.3% of child maltreatment referrals that were determined to be "unsubstantiated" is not as alarming as it appears because an "unsubstantiated" determination merely indicates that child protective authorities were unable to amass sufficient evidence, not that the allegations were untrue. *Id.* at 11-12. But we wonder what message this is meant to send given that the percentage of false allegations, and thus the number of unnecessary child protective agency interventions - including seizures of children - still must be quite substantial.

ARGUMENT

UNDER THE FOURTH AMENDMENT, CHILD PROTECTIVE AUTHORITIES SHOULD BE REQUIRED TO OBTAIN ADVANCE JUDICIAL APPROVAL OF SEARCHES AND SEIZURES OF CHILDREN WHENEVER IT IS PRACTICABLE TO DO SO

I. The Fourth Amendment Creates a Presumption in Favor of Judicial Review, Which, in this Context, Will Protect Children and Families from Inappropriate and Potentially Harmful Searches and Seizures By Child Protective Authorities, and Involves No Additional Risk of Harm

The Fourth Amendment is applicable to the activities of civil as well as criminal authorities. Even school officials, who, unlike child protective authorities, have temporary physical custody with the consent of students' parents, are deemed to be exercising public rather than parental authority when they search students. *New Jersey v. T.L.O.*, 469 U.S. 325, 335-337 (1985). Thus, the starting point for any Fourth Amendment analysis of child protective investigations should be this presumption articulated in *Terry v. Ohio*, 392 U.S. 1 (1968): "We do not retreat from our holdings that police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure (citations omitted), or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances (citations omitted)." 392 U.S. at 20.

Removal from parental custody constitutes the ultimate governmental intrusion on the child's Fourth

Amendment rights. The child experiences a complete deprivation of personal liberty, and the wrenching loss of familial connections. The child is compelled to live away from his or her family, in a foster family home if he or she is lucky, or, if not so lucky, in a congregate care facility in which emotional support is difficult if not impossible to come by. Although an adult arrestee knows about the possibility of release with or without bail, a child might well fear that the removal is permanent, and that the family life he or she once took for granted, and perhaps those he or she loves, have been lost for all time. This exacerbates the risk of serious and lasting trauma, which, of course, is particularly vexing in those cases in which the removal is later found to have been unwarranted and is overturned by a judge.

Accordingly, the New York State Legislature recognized long ago that a fair balancing of families' constitutional right to remain together, and the State's interest in protecting children, justifies imposition of a requirement that the authorities seek a court order before removing a child when the resulting delay will not place the child at risk. New York Family Court Act § 1024, which authorizes emergency removal by child protective authorities and other specified officials without a court order, states that such a removal may take place if: "(i) such person has reasonable cause to believe that the child is in such circumstances or condition that his or her continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health; and (ii) *there is not time to apply for an order* under [N.Y. Fam. Ct. Act § 1022]" (emphasis supplied).

The safeguards and benefits provided by advance judicial review are obvious. Judges are far more likely to be faithful to the law governing removal and other searches or seizures than a well-intentioned but possibly skittish child protective worker. Judges lack an emotional or professional stake in the outcome, while child protective agencies often adopt "safety first" policies that encourage, or at least condone, employees' reliance on guesswork and hunches. Agencies also overreact and intervene too often and too aggressively in the wake of a highly-publicized child fatality that allegedly resulted from an agency's failure to intervene. Judges do have personal views about child safety issues, but, because of their assigned role and their training, are far more likely to steer a middle course no matter what the public mood seems to be or what political winds are blowing inside the child welfare agency.

Those of us who are familiar with the workings of the juvenile/family courts also know that once an agency has removed a child without a court order, the deck can become stacked in favor of continued removal. After the child already has experienced the trauma of separation, a judge might be more likely to order removal than the judge would be when making the decision in the first instance. Although a parent has a presumptive right to custody, a judge might be influenced by the fact that the children already are residing with foster parents who are believed to be capable and caring, or be swayed by a natural reluctance to uproot the children yet again before more information is obtained. *See* Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L. J. 913, 928 (2004) (author notes that judges apply a higher standard when judging warrant applications before a search than

when deciding suppression motions after incriminating evidence has been found).

Child protective agencies are well aware that they can carry out their own changing and idiosyncratic policies regarding searches and seizures, and gain an advantage in litigation, when they act unilaterally rather than expose their decision-making to judicial review. New York City's child protective agency (now called the Administration for Children's Services, or "ACS") has a history of violating N.Y. Fam. Ct. Act § 1024 by removing children without attempting to obtain a court order in circumstances in which there was ample time to do so without placing the child at any risk of harm. The message from child protective agencies that operate in this way is unmistakable: we know best how to protect children, and because judicial review will only postpone the inevitable or else hinder our work, we will avoid it when we can and do what we believe is best for the children. This is not to say that the agencies do not have good intentions, but, like many other government agencies, they often prefer not to have their behavior scrutinized, or be inconvenienced.

This tendency to avoid judicial oversight whenever possible has not gone unnoticed by courts in New York. In *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), the Second Circuit cited evidence that it was routine child protective agency practice to seek a removal order from a court only after removing the child. New York City specifically conceded that both "the removal of Sarah and her subsequent examination" were accomplished pursuant to City policy, and that concession was reconfirmed at oral argument in the Second Circuit. 193 F.3d at 591.

In *Nicholson v. Williams*, 344 F.3d 154 (2d Cir. 2003), plaintiffs alleged that there was a government custom or practice of removing children from the custody of a parent who had been battered by a spouse or paramour, based on the theory that the parent's failure to protect the child from witnessing the abuse was itself a form of child neglect. The district court found that, in many instances, removal took place, either with or without court order, where the only substantiated basis for finding neglect was that the custodial parent "allowed" the child to witness the custodial parent being abused by another adult. The district court also found that top policy-makers at the agency knew of the practices alleged, and responded by making only cosmetic changes in the agency's policy statements, which offered contradictory guidance or no guidance at all, and generally had taken only preliminary and insufficient steps to train the agency's staff to understand domestic violence issues. 193 F.3d at 163-164.

In *People United For Children, Inc. v. City of New York*, 214 F.R.D. 252 (S.D.N.Y. 2003), *reconsideration denied* 2003 WL 22056930, plaintiffs who were "African American or black" alleged that ACS failed to fully investigate allegations of child neglect and abuse against parents and legal guardians before removing children from their custody, and that there was a policy of resolving "[a]ny ambiguity regarding the safety of a child ... in favor of removing the child from harm's way" and returning children to their parents or guardians "[o]nly when families demonstrate to the satisfaction of ACS that their homes are safe and secure." 214 F.R.D. at 254-55.

Our staff still sees evidence of these practices. We often represent children who have been removed by the agency without a court order months after the

initial report of abuse or neglect was made, and in many instances the removal does not appear to have been fueled by new evidence of abuse or neglect. Sometimes removal is a child protective worker's reaction to the parents' lack of cooperation, and is designed to create a more powerful incentive for the parents to comply with the agency's efforts to provide rehabilitative services. Needless to say, the agency is later hard-pressed to explain why it allowed the children to remain at home for many months, and, all of a sudden, found there was an emergency that justified removing the children without first seeking court authorization.

Petitioners and their *amici* supporters highlight the State's compelling interest in protecting children and the fact that seizures by child protective agencies flow from a desire to protect the child, and also observe that the child has an independent right to be protected from harm.[5] We do not doubt that. But that is in no way relevant to the question of whether judicial review is practicable or desirable. Arrests of criminal suspects flow in part from a desire to protect the community from a potentially dangerous individual: that impulse is no less salutary than the desire to protect a child from an abuser, yet no one has ever cited it as reason for circumventing court review. *See* Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. at 475-476 ("Notably, courts that favor the Fourth Amendment's particularized warrant and probable cause requirements

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5. *See, e.g., Brief of the California State Ass'n of Counties, and League of California Cities as Amicus Curiae in Support of Petitioners*, at 23-28; *Brief of the Cook County Public Guardians as Amicus Curiae in Support of Neither Party and Suggesting Reversal*, at 7.

reject the argument that state officials need unfettered discretion to conduct this class of investigations simply because they concern children. Instead, they equate child abuse with other violent crimes for which no exception exists to the Fourth Amendment's usual strictures; they find that the exigent circumstances exception is an adequate tool to protect children who the government legitimately perceives to be at risk").

Moreover, while child protective agencies' intent may be to protect children from abuse and neglect at home, often they provide substandard conditions as an alternative, and make inadequate efforts to reunite the family. In our practice, we see children who have been denied visitation with their parents that is sufficient to preserve familial ties, or been placed inappropriately in institutional settings when they should be in a foster family home, or been separated from their siblings and placed in different homes or congregate care facilities, or been deprived of adequate medical and mental health treatment and other essential services. The many lawsuits aimed at dysfunctional child welfare systems around the country attest to the failure of child protective authorities to provide quality care and services to children and their families, and, in many instances, to protect children from being abused and neglected *in foster care*.[6] So, when child

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6. A number of these cases are cited in *Kenny A. v. Perdue*, 2004 WL 5503780 (N.D.Ga. 2004). In *LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), *aff'g* 762 F.Supp. 959 (D.D.C. 1991), scandalous problems in the District of Columbia's child welfare system were exposed. Problems in New York City's child welfare system were brought to light in *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997), *aff'g* 929 F.Supp. 662 (S.D.N.Y. 1996). In *Nicholson v. Scoppetta*, 3 N.Y.3d 357 (2004), the New York State Court of

protective authorities pray for special treatment under the Fourth Amendment, they do not do so with clean hands. Their history of failing to protect children sounds the alarm for as much judicial oversight as is practicable.

In sum, requiring advance judicial authorization for child protective seizures whenever practicable is a "win-win" proposition. It will create no additional risk to children's safety, and will improve overall outcomes by protecting children and their families from the harm that flows from unnecessary and improper searches and seizures. *See Tenenbaum v. Williams*, 193 F.3d 581, 604 ("As we observed in discussing procedural due process, judicial authorization makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State"). Law enforcement authorities investigate crimes, and confront public emergencies and dangers, that require a prompt and focused response, and yet those authorities have managed to function effectively under the Fourth Amendment's probable cause and warrant requirements. There is no reason why child protective authorities cannot do so as well. The agencies and their attorneys are fully familiar with the courts in which they practice and appear, and know how to obtain court orders when they need them.

Appeals held that the risks to the child resulting from removal itself must be factored into the agency's removal determination, and thus a court, when considering removal, must do more than identify the existence of a risk of serious harm. "Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests." 3 N.Y.3d at 378.

II. Federal Appeals Court Decisions Have Applied Probable Cause and Advance Judicial Review Requirements To Home Entries, Removals of Children for Placement in Foster Care, and Physical Examinations of Children by Child Protective Authorities

When child protective authorities investigating allegations of abuse or neglect enter a family's home without consent and/or seize a child for the purpose of placing the child in foster care, or conduct an intrusive body search, Fourth Amendment probable cause and judicial authorization requirements should apply unless a person exercising reasonable judgment would conclude that the child will be exposed to the danger of abuse before court authorization can be obtained. If there is time to go to court, *there is no emergency*, and thus it is unreasonable to seize the child. Support for this view appears in federal appeals decisions, and we urge the Court to adopt the reasoning in those cases. While some of those decisions, like the Ninth Circuit's decision in this case, appear to have turned on the fact that there was police involvement,[7] we do not believe that the absence of police involvement should be a decisive factor since the need for judicial review is compelling no matter who is taking action. And, even if the Court does not apply probable cause and judicial review requirements, and chooses instead to apply a "reasonableness" standard, the Court should hold that it is not reasonable for a child protective agency to engage in these intrusive activities

7. The Ninth Circuit itself had previously applied traditional Fourth Amendment protections to a non-consensual home entry by a social worker and a police officer to interview and examine the children. *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999).

without a court order when there is ample time to obtain an order without endangering the children.

The dangers created by child protective agency overreaching are nowhere more evident than in the Second Circuit's decision in *Tenenbaum v. Williams*, 193 F.3d 581. Five-year-old Sarah Tenenbaum was removed at about noon from her kindergarten class without a court order or parental consent and taken to the emergency room at Coney Island Hospital where a pediatrician and a gynecologist examined her for signs of possible sexual abuse. When no signs were found, Sarah was returned to her parents and the matter was abandoned by the authorities as an "unfounded" report of abuse. Sarah's parents brought suit against, *inter alia*, New York City and its child protective agency (then known as the Child Welfare Administration), and raised substantive and procedural Due Process and Fourth Amendment claims.

A Second Circuit majority, reversing an award of summary judgment in defendants' favor, found a triable issue of fact as to whether defendants' removal of Sarah from school was contrary to Sarah's right to be free from unreasonable seizures under the Fourth Amendment. In doing so, the court, while holding that it is appropriate to apply Fourth Amendment probable cause and warrant requirements to child protective authorities, concluded that "[i]f information possessed by [the child protective workers] warranted a person of reasonable caution in the belief that Sarah was subject to the danger of abuse if not removed from school before court authorization reasonably could be obtained, Sarah's removal complied with Fourth Amendment requirements despite the absence of a warrant equivalent because probable cause,

reasonable cause, *and* exigent circumstances sufficient to justify it existed." 193 F.3d at 605.[8]

Rejecting application of Fourth Amendment "special needs" analysis, the Second Circuit asserted that "if [child welfare] caseworkers have 'special needs,' we do not think that freedom from ever having to obtain a predeprivation court order is among them. Caseworkers can effectively protect children without being excused from '*whenever practicable,* obtain[ing] advance judicial approval of searches and seizures.' *Terry v. Ohio,* 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (emphasis added). As we observed in discussing procedural due process, judicial authorization makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State. At the same time, it cannot be said that the requirement of obtaining the equivalent of a warrant where practicable imposes intolerable burdens on the government officer or the courts, would prevent such an officer from taking necessary action, or tend to render such action ineffective." 193 F.3d at 604.

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8. The Eleventh Circuit prefers an exigent circumstances analysis that does not automatically turn on the feasibility of prompt court review and allows consideration of all the circumstances. *Doe v. Kearney,* 329 F.3d 1286, 1297-1298 (11th Cir. 2003). The Tenth Circuit agrees with the Eleventh Circuit that the presence or absence of sufficient time for judicial approval should not be "the single focus," because "[i]n many instances, it may not be entirely clear either how long it would take to obtain judicial approval or whether the period of delay would jeopardize the safety of the child," but has warned that if no consideration is given to the availability of judicial approval, "the definition of an emergency may be broadened to such an extent that due process rights are eroded. *Tenenbaum,* 193 F.3d at 584." *Gomes v. Wood,* 451 F.3d 1122, 1130-1131 (10th Cir. 2006).

The Second Circuit also held that even under special needs analysis, the same result was required: "If a more general 'special needs' 'reasonableness' test applies, we nonetheless see no basis upon which to depart from the probable cause standard here. If the information possessed by [the child welfare workers] would have warranted a person of reasonable caution in the belief that Sarah was subject to the danger of abuse if not removed from school before court authorization could reasonably have been obtained, her removal was reasonable also." 193 F.3d at 604.[9]

The Second Circuit also found that the physical examination of Sarah violated her Fourth Amendment rights, noting that there was no emergency because, at the time of the examination, Sarah "could not have been in danger from her father while she was being held by the [child protective agency]." 193 F.3d at 606.

Similarly, when addressing home entries made by child protective authorities, federal appeals courts have held that Fourth Amendment probable cause and judicial authorization requirements apply, at least when there is police involvement. This should come as no surprise given

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9. The Second Circuit did not hold that special needs analysis will never be appropriate: "But we refrain from deciding categorically, as did the district court, that the removal of a child of whom abuse is suspected is not a 'special needs' situation. There may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal or child examination context." 193 F.3d at 604. But the Second Circuit did not give the child welfare agency unfettered discretion to proceed without a warrant as petitioners and their supporters would have this Court permit.

that the Fourth Amendment is concerned most of all with protecting citizens from physical entry into the home. *Payton v. New York*, 445 U.S. 573, 585-586 (1980); *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972).

In *Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087 (3d Cir. 1989), the Third Circuit held that a caseworker and a police officer violated the Fourth Amendment when they entered plaintiffs' home and strip searched a child in the absence of consent, a valid search warrant, or exigent circumstances. The court noted that "[t]he Fourth Amendment caselaw has been developed in a myriad of situations involving very serious threats to individuals and society, and we find no suggestion there that the governing principles should vary depending on the court's assessment of the gravity of the societal risk involved. We find no indication that the principles developed in the emergency situation cases we have heretofore discussed will be ill suited for addressing cases like the one before us." 891 F.2d at 1094.

In *Gates v. Texas Department of Protective and Regulatory Services*, 537 F.3d 404 (5th Cir. 2008), the Fifth Circuit, noting that traditional Fourth Amendment standards regulate social workers' civil investigations, 537 F.3d at 419-420, held that social workers violated the Fourth Amendment when they made a warrantless entry into plaintiffs' home in the absence of consent or exigent circumstances. The court found no special needs in light of the involvement of law enforcement officers, who accompanied the social workers into the home. 537 F.3d at 424. The Fifth Circuit had reached a similar conclusion in *Roe v. Texas Department of Protective and Regulatory Services*, 299 F.3d 395 (5th Cir. 2002),

where child protective workers and the police entered and conducted a visual search of a child's body cavities without a warrant.

In *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003), the Tenth Circuit held that there was no special need that rendered the Fourth Amendment's warrant requirement impracticable when social workers, accompanied by a police officer, entered a home to remove a child. 328 F.3d at 1242.

In *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003), the Eleventh Circuit held that a state official must obtain a court order prior to removing a suspected victim of child abuse from parental custody unless there is probable cause to believe the child is threatened with imminent harm. 329 F.3d at 1293-1294.[10]

III. The Emergency and Exigent Circumstances Exceptions to the Judicial Authorization Requirement, and the Possibility of Obtaining Consent, Provide Child Protective Agencies With More Than Enough Authority to Protect Children From Imminent Harm

When a child is at risk of being abused before a court order can be obtained, child protective agencies can rely

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10. The Seventh Circuit has taken a somewhat different approach. In *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000), the Seventh Circuit held that the removal of a child from his or her home is reasonable if it is: (1) done pursuant to a court order; (2) supported by probable cause; *or* (3) justified by exigent circumstances, meaning that state officers had reason to believe that life or limb was in immediate jeopardy. 235 F.3d at 1010.

on the emergency and exigent circumstances exceptions. With respect to home entries, the emergency exception is particularly suitable. Child protective officials "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). All that is required is an objectively reasonable basis for believing that a person in the house is in need of immediate aid. *Michigan v. Fisher*, _U.S._, 130 S.Ct. 546, 548 (2009) (entry was reasonable where defendant's projectiles might have a human target, "perhaps a spouse or a child"). The exigent circumstances exception provides broad discretion in other circumstances. *See, e.g., Tierney v. Davidson*, 133 F.3d 189 (2d Cir. 1998) (search after officer discovered defendant was justified by concern that defendant or children were still in danger); *United States v. Antwine*, 873 F.2d 1144 (8th Cir. 1989) (entry justified after arrest of defendant where agent believed he needed to obtain weapon displayed by defendant prior to leaving children alone in home).

The exigent circumstances exception certainly could come into play during an investigation at a child's school. Say a thirteen-year-old child is interviewed at 9:00 a.m. and discloses that her father, her sole caretaker, has been sexually abusing her. She is scheduled to be discharged from school and picked up by her father at 2:30. That leaves more than five hours within which the agency can appear before a judge and seek a court order. But if the same child walks up to her teacher minutes before she will be picked up by her father and makes the same disclosure, getting a court order before the father takes the child home is impossible, and thus the agency may remove the child without a court order. Moreover, if, in the former scenario,

the agency found that because of court congestion it could not get in front of a judge before 2:30, removal without a court order might also be appropriate.

Undoubtedly, it is in the interests of petitioners and their *amici* supporters to downplay the prominent role of these exceptions in Fourth Amendment jurisprudence. They would rather have the Court be alarmed at the prospect of children being harmed while child protective authorities are seeking a court order. Yet, where a child protective agency has reasonably concluded that a child would be seriously harmed if allowed to return to or remain in the home, and there is not sufficient time to obtain a court order, who would second guess the decision to rely on an exception to the warrant requirement?

In many instances, child protective authorities are able to obtain voluntary consent from the parents or from the child. Again, petitioners and their supporters might prefer to downplay the utility of this option, but in our experience consent is provided routinely. The Ninth Circuit, as well as petitioner and their *amici* supporters, have focused on *parental* consent. Yet, because a child's own Fourth Amendment rights are at stake, we think the child's willingness, or refusal to consent will be a critical factor in certain contexts. Say, for instance that a seventeen-year-old child's parents refuse to consent to an examination of the child for signs of physical abuse, but the child, seeking protection from her abusive parents, is willing to submit to the examination. The child's consent should control. The same would be true if the parent consented to the examination, but the child refused. In contrast, we think the parent's consent should be effective when a three-year-old child is to be examined since a

child that age has no reasonable expectation of privacy that competes with parental prerogatives. In this case, what if S.G., upon leaving her classroom, had asked why she was being taken out of class, was informed that there were people there who wanted to talk to her about whether her father was hurting her, and promptly said she did not want to go and started back towards her classroom. Would anybody be arguing that she was not seized if she had been grabbed by the elbow and, while she tried to pull away, been forcibly taken to see Camreta and Alford? And if S.G. had expressed relief that, finally, someone had found out what was happening and was going to help her, would anybody be arguing that there was a seizure?

IV. Investigative Activity by Child Protective Authorities Which Falls Short of a Removal for Placement in Foster Care, But Far Exceeds the Scope of a Limited Seizure, Should Require Advance Judicial Authorization Whenever It is Practicable

Due to the length of time involved and the level of interference with a child's liberty, certain seizures that do not involve placement in foster care should activate probable cause and judicial authorization requirements. An example would be a case in which a child protective caseworker and a police officer, after being allowed to enter a family's home, compel the parents and the child to accompany them to the caseworker's office, or to a doctor's office or a hospital, for purposes of further investigation.

In *Hayes v. Florida*, 470 U.S. 811 (1985), the Court held that the Fourth Amendment was violated when a suspect was transported to the station house for fingerprinting,

without his consent and without probable cause or prior judicial authorization. The Court noted: "There is no doubt that at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments. . . . We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause." 470 U.S. at 815-16.

It is true that a criminal suspect may be arrested outside his or her home without a warrant. In *United States v. Watson*, 423 U.S. 411 (1976), the Court noted that "the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." 423 U.S. at 423-424. But no such judgment has been made regarding seizures of children during child protective investigations, and there is no possibility of "endless litigation" in child protective court proceedings since evidence is not subject to suppression in such proceedings on Fourth Amendment grounds. *See Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) (court "ha[s] repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials").

Moreover, while an at-large criminal suspect may do more harm and must be apprehended as soon as possible,

a child who has allegedly been victimized presents no danger. As well, a child protective worker's determination that a child is in imminent danger involves an intricate and potentially subjective and speculative analysis that differs dramatically from a police officer's fact-driven, dispassionate determination of probable cause. Thus, judicial review is far more important as a safeguard in the context of child protective investigations. As one author has put it: "For all these reasons, rescue is more of a gamble than might initially appear. While I am not aware of data that proves or disproves this proposition, it appears reasonable to believe that the likelihood of erroneous rescue is larger than the likelihood of erroneous arrest. The modern child welfare system lacks the indicia of reliability attached to criminal law enforcement. Unlike police forces, caseworker turnover is constant. Training is minimal and morale low. Caseworkers are routinely expected to apply vague standards to ambiguous facts. In light of the uncertainty that is naturally attached to these problems, one could easily conclude that greater procedural protections are needed. Post-deprivation review may suffice for arrest, but not for rescue and removal." Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L. J. at 962.

V. When the Child is Seized in a Manner Equivalent to a Limited "Terry Stop," Application of Terry's Reasonableness Standard is Appropriate, But Where, as Here, the Child is Seized Several Days After the Report of Abuse, Advance Judicial Authorization Should be Required

Petitioners and their *amici* supporters suggest that the Ninth Circuit's ruling poses a threat to all questioning

of children during child protective investigations. Admittedly, if this Court were to rule that any incidental restriction on a child's freedom of movement during interviewing by child protective authorities always constitutes a seizure, *and* always activates probable cause and warrant requirements, we would have concerns as well.

Yet the Ninth Circuit did not come close to ruling that interviews of the type involved in this case always, or even frequently, constitute a seizure. Rather, the court was persuaded that there was a seizure in a case involving an interview that had certain coercive elements, including: (1) the fact that the school counselor told S.G. that someone was there to talk with her and took her to the room where Camreta and Alford were waiting; (2) Camreta's insistent questioning about "bad touches" in an attempt to get S.G. to change her answers; (3) the two-hour length of questioning; and (4) the presence of an armed police officer. On these facts, we do not think that ruling was unreasonable.[11] Indeed, support for the Ninth Circuit's ruling appears in *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), which was cited by the Ninth Circuit (588 F.3d at 1022). In *Heck*, the Seventh Circuit found that a private school student was seized when he was escorted from class by the Principal, the caseworkers, and a uniformed police officer into the church's nursery, and then questioned, with the police officer present, for twenty minutes about intimate details of his family life, because no reasonable child would have believed that he was free to leave the

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11. Petitioners do not directly challenge the Ninth Circuit's finding that a seizure occurred. Their *amici* supporters are divided into two camps: some, including the Solicitor General (*Brief for the United States as Amicus Curiae Supporting Petitioners*, at 21-22), assume *arguendo* that there was a seizure, while others directly challenge the Ninth Circuit's seizure finding.

nursery. Likewise, in *Williams v. Pollard*, 44 F.3d 433 (6th Cir. 1995), the Sixth Circuit found that there was a seizure when a social worker interviewed the child for more than two hours.[12]

It is true that this case involves a limited seizure, and not a full-blown removal of the child from the custody of the parents or an intrusion that far exceeded the scope of a typical seizure. Nevertheless, the Ninth Circuit properly applied traditional Fourth Amendment requirements. The Oregon Department of Human Services ("DHS") was informed that about a week earlier Nimrod Greene had been arrested on a charge that he had touched the penis of F.S., a seven-year-old boy, over his jeans when Nimrod was drunk in the home of F.S.'s parents. F.S.'s mother told the police that S.G.'s mother Sarah had complained about the way her husband Nimrod makes S.G. and her sister K.G. sleep in his bed when he is intoxicated, and that Sarah did not like the way Nimrod acts when S.G. and K.G. are sitting on his lap. F.S.'s father told the police that Nimrod

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12. These seizures by child protective authorities bear no resemblance to the suspicionless, information-seeking highway stops approved in *Illinois v. Lidster*, 540 U.S. 419 (2004). Although S.G., like the motorists in *Lidster*, was potentially a witness to illegal conduct, in *Lidster* the Court relied on the fact that "[i]nformation-seeking highway stops are less likely to provoke anxiety or to prove intrusive" than the checkpoint stops in *Indianapolis v. Edmonds*, 531 U.S. 32 (2000) that were aimed at individuals involved in drug offenses; the fact that information-seeking stops "are likely brief"; and the fact that "citizens will often react positively" to being stopped. 540 U.S. at 425. In contrast, seizures of children by child protective workers are likely to provoke anxiety and/or prove intrusive, are not likely to be brief, and usually will not inspire a positive reaction.

himself had commented about accusations made by Sarah that he molested his daughters, and about the fact that Sarah did not like it when the girls lay in bed with him when he had been drinking. F.S.'s father informed the police that these types of comments and accusations had "come in several ways" from Nimrod and Sarah.

This was more than enough information - it included Sarah's admission that she had allowed inappropriate contacts between the girls and their father, and a possible admission by Nimrod - to support an application for a court order permitting DHS to seize S.G. for purposes of an interview. DHS had no need to develop additional facts in order to persuade a judge that there were sufficient grounds for the school seizure. Instead, DHS waited three days before going to S.G.'s school. This was not a dynamic, rapidly developing investigative process. This was a pre-planned seizure that could, and should, have been reviewed by a judge before it happened. Faced with ample time to seek a court order, the agency chose to act unilaterally.

In these circumstances, the Ninth Circuit's ruling makes complete sense. Indeed, the Ninth Circuit remained true to this Court's admonition in *Terry v. Ohio* that, whenever practicable, advance judicial approval of searches and seizures should be obtained. The Ninth Circuit's holding also finds support in *Doe v. Heck*, 327 F.3d 492, where the Seventh Circuit, after finding that the child was seized when he was escorted from a classroom into a church nursery and questioned with a police officer present, held that the seizure was presumptively unreasonable and could be upheld only if it fell within one of the few specifically established and well delineated

exceptions to the Fourth Amendment's warrant and probable cause requirements. 327 F.3d at 513.[13]

It is true that conducting an interview with S.G. rather than removing the children was a prudent thing to do, since the possibility existed that DHS would determine that S.G. and her sister had not been abused or that there was a safety plan that would suffice as protection. It is also true that seeking parental consent would have given the parents a "heads-up" and created a risk that they would interfere with the free flow of information from the children.[14] If DHS had merely conducted a non-coercive

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13. For the reasons cited by the Ninth Circuit (*Camreta*, 588 F.3d at 1023-1025), and by the Second Circuit in *Tenenbaum* (193 F.3d at 607), the fact that S.G. was seized in school is not relevant. It is true that "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *New Jersey v. T.L.O.* 469 U.S. at 340. But when there is more than sufficient time to obtain a court order while the child remains safe, requiring child protective officials to apply for an order causes no inconvenience that justifies forgoing the ample benefits of judicial oversight. We reject any suggestion that merely because the child is not free to leave the school during school hours, the child is virtually fair game for anyone, including a child protective caseworker or a police officer, who wishes to seize the child on school grounds.

14. We agree with the Ninth Circuit (*Camreta*, 588 F.3d at 1030, n.18) and the Second Circuit (*Tenenbaum*, 193 F.3d at 594, n. 9) that school officials' consent to a seizure of a student is not effective for Fourth Amendment purposes. A child attends school to get an education. That is the expectation of the parents when they send their child to school, and that is the child's expectation. When school officials interfere with a child's freedom of movement within the school for the purpose of maintaining discipline and order, it does not upset the reasonable expectations of the child

interview of S.G., there would be no Fourth Amendment issue presented. And if DHS had gone to the school without the police immediately after the allegations came to light, and, as a result of information developed during non-coercive initial questioning, detained S.G. temporarily in a *Terry*-like dynamic encounter to determine whether it was safe for her to return home, we would be on petitioners' side, arguing that the reasonableness standard should apply and that DHS needed only reasonable suspicion that S.G. had been abused.[15]

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or her parents. In contrast, when a child protective caseworker removes a child from a classroom learning environment and confines the child in a room and questions the child about abuse allegations that have absolutely nothing to do with school discipline and order, the child's freedom of movement has been restricted in a manner that bears no resemblance to what is expected or typical in the school setting. Although the Seventh Circuit takes a different view when public school (rather than private school) officials are involved [*compare Darryl H. v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986) (where visual inspections of children were conducted by child protective workers in public school with consent of school officials, probable cause and warrant not required) *with Doe v. Heck*, 327 F.3d 492], we urge this Court not to do so and transform teachers into adjuncts of child welfare workers.

15. Both petitioner Alford (*Brief For Petitioner James Alford*, at 61), and the Solicitor General (*Brief for the United States as Amicus Curiae Supporting Petitioners*, at 7), have proposed a reasonable suspicion standard. This position finds support in cases upon which petitioners rely, such as *Terry v. Ohio* and *New Jersey v. T.L.O.* Others have pointed out that "[d]emonstrating that probable cause exists is particularly difficult in child abuse situations because often only the abuser and the victim know about the offense." *Brief of the States of Arizona, et al. as Amicus Curiae in Support of Petitioners*, at 30. But because this argument, taken to its logical conclusion, would justify rejection of even a reasonable suspicion requirement, and leave child protective authorities free to act based on rumor and conjecture, the argument must fail. The

But all that has nothing to do with the question of whether DHS, sufficiently sanguine about S.G.'s safety to let three days go by without speaking to her, should have obtained a court order before conducting a pre-planned Fourth Amendment seizure with the assistance of an armed police officer.

CONCLUSION

We know full well the importance of a prompt, thorough, and probing investigation of allegations of abuse or neglect. At the same time, we know that the child welfare system is deeply flawed. Child protective agencies, protective of their prerogatives and resistant to judicial oversight, do not have the kind of track record that justifies awarding them special treatment under the Fourth Amendment.

If the Court wishes to find a weather vane to point it in the right direction, it need look no further than the Federal trial and appellate courts. Those are the courts in which child welfare authorities have been sued by families that have been victimized by unnecessary and arbitrary agency intervention, and by foster care systems in which children languish for years without finding permanency, receive inadequate medical and mental health treatment and educational services, and are physically and emotionally abused. Those are the courts that know well the child welfare system's worst flaws, and the response from those courts has been to require judicial review, whenever it is practicable, *before* a child is seized.

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need to develop evidence via an interview with the child cannot, by itself, justify a seizure, much less a removal for placement in foster care.

We do not doubt the good faith of child welfare authorities. But under Fourth Amendment analysis, "special needs" arise not from noble motives, but from the need to take action unfettered by probable cause and warrant requirements. There is a special need to seize a child without a warrant when an informal interview suddenly yields information about abuse and the child would be in danger if she were allowed to go on her way. But there is no special need when there is ample time to get a court order authorizing a home entry, or the removal of a child for placement in foster care, or a physical examination for signs of sexual abuse, without exposing the child to danger. And, in this case, there was no special need when S.G. was seized three days after abuse allegations came to the attention of child protective authorities.

Accordingly, we urge the Court to find that the seizure of S.G. violated the Fourth Amendment and affirm the decision below.

Respectfully submitted,

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